

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

ORDER

Plaintiff,

v.

04-cr-139-bbc

DRAE BROADNAX,

Defendant.

In an order entered on July 18, 2008, I denied defendant Drae Broadnax's motion pursuant to 18 U.S.C. § 3582 and Amendment 709 to the Sentencing Guidelines. Thereafter, on July 30, 2008, defendant filed a timely Rule 59 motion, which I denied on August 1, 2008. Now defendant has filed a notice of appeal from both orders. He has not paid the \$455 fee for filing his notice of appeal, which is required if he is to take an appeal from the denial of a § 3582 motion. Therefore, I construe defendant's notice as including a request for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915.

As an initial matter, I note that defendant's appeal appears to be untimely. It was not filed within sixty days of the date of the order denying his Rule 59 motion, and defendant did not include with his notice a motion for an extension of time to file a notice of appeal

that was supported by a showing of excusable neglect or good cause for the late filing as Fed. R. App. P. 4 requires. However, district courts do not have authority to deny a defendant's request for leave to proceed in forma pauperis on the ground that the appeal is untimely. That authority rests solely with the court of appeals. Sperow v. Melvin, 153 F.3d 780 (7th Cir. 1998). Therefore, I will consider defendant's request for leave to proceed in forma pauperis on appeal and deny the motion because defendant's appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3).

As I explained in both the July 18 and August 1, 2008 orders, defendant is not eligible for a sentence reduction under § 3582 because his sentence was determined by his status as a career offender and not by drug quantity. His argument to the contrary is baseless. Because defendant wants to raise a legally frivolous argument on appeal, I must certify that his appeal is not taken in good faith.

Pursuant to Fed. R. App. P. 24, defendant has 30 days from the date of this order in which to ask the court of appeals to review this court's denial of leave to proceed in forma pauperis on appeal. His motion must be accompanied by an affidavit as described in the first paragraph of Fed. R. App. P. 24(a) and a copy of this order.

ORDER

IT IS ORDERED that defendant Drae Broadnax's request for leave to proceed in

forma pauperis on appeal from this court's orders of July 18, 2008 and August 1, 2008 is

DENIED. I certify that defendant's appeal is not taken in good faith.

Entered this 7th day of November, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge